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No. 82-1451

In the Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES M. PRESTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there was a sufficient connection between the seized airplane and petitioner's illegal narcotics activity to warrant forfeiture of the airplane under 21 U.S.C. 881(a)(4).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 691 F.2d 725. The findings of fact and conclusions of law of the district court (Pet. App. 8a-11a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on November 12, 1982. The petition for rehearing (Pet. App. 12a-13a) was denied on December 29, 1982. The petition for a writ of certiorari was filed on February 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Texas, petitioner's 1964

Beechcraft Baron aircraft was ordered forfeited to the United States under 21 U.S.C. 881(a)(4).[1]

1. The evidence, as reflected in the opinions of the courts below, showed that in January 1978, Drug Enforcement Administration (DEA) agents met with petitioner's friend, Richard Lee Sullivan (Pet. App. 2a). During that meeting, Sullivan asked the agents if they could supply him with phenyl-2-propanone (P2P), which can be used in producing amphetamines and methamphetamines (*ibid.*).

A deal was arranged, and two weeks later petitioner drove Sullivan to a bar in Clovis, New Mexico, where Sullivan purchased 500 grams of P2P from the agents. Petitioner then drove Sullivan back to Amarillo, Texas (Pet. App. 2a).

On March 7, 1978, petitioner used the airplane at issue to fly Sullivan from Amarillo to the airport in Abilene, Texas, for another meeting with the DEA agents (Pet. App. 2a, 9a). At that meeting, the agents again sold P2P to Sullivan, this time in a five-gallon can that had been fitted with an electronic transmitter (beeper). Sullivan put the can aboard petitioner's airplane and they returned to Amarillo. There, surveillance agents observed them remove the container of P2P from the plane and put it in petitioner's automobile (*ibid.*). The P2P was then taken to petitioner's place of business in Amarillo. Petitioner subsequently destroyed

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[1] 21 U.S.C. 881(a)(4) provides in pertinent part:

> (a) * * * The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * * *
>
> (4) All conveyances, including aircraft * * *, which are used, or are intended for use, to transport, or in any manner facilitate the transportation * * * of [all controlled substances acquired in violation this subchapter] * * *.

the P2P and its container in order to conceal the drug conspiracy (*id.* at 2a-3a, 9a-10a).[2]

2. The district court ordered petitioner's airplane forfeited to the United States under 21 U.S.C. 881(a)(4) (Pet. App. 8a-11a). The court found that the government had established "[p]robable cause * * * to believe that [petitioner's] aircraft was used [to facilitate the transportation of the P2P]," and in this regard, found as a fact that petitioner was aware at all times of the use to which Richard Sullivan intended to place the P2P, *i.e.*, to manufacture amphetamines and methamphetamines (*id.* at 10a, 1a-2a). The court also found that petitioner had failed to establish that the plane was "absolved from culpability or that the forfeiture [was] not properly within the forfeiture statute" (*id.* at 10a).

The court of appeals affirmed (Pet. App. 1a-6a). It expressly rejected petitioner's contention that in order to forfeit property pursuant to 21 U.S.C. 881(a)(4), the government was required to prove that there was a "substantial connection" between the seized aircraft and the criminal activity (Pet. App. 4a). The court held that only under 21 U.S.C. (Supp. V) 881(a)(6), involving the forfeiture of currency, is the government required to show a substantial connection between the property seized and the narcotics transaction (Pet. App. 4a-5a). The court concluded that the evidence was sufficient to establish that probable cause existed to forfeit the airplane (*id.* at 5a).

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[2]Petitioner and Sullivan were indicted for their participation in the narcotics conspiracy, and petitioner pleaded guilty to misprision of a felony (18 U.S.C. 4) (Pet. 4).

ARGUMENT

Petitioner contends (Pet. 6-8) that the court of appeals' reliance on the statutory language "used in any manner" to describe the necessary relationship between the vehicles or aircraft to be forfeited and the illegal activity giving rise to the forfeiture conflicts with the decisions in *United States* v. *One 1972 Chevrolet Corvette*, 625 F.2d 1026 (1st Cir. 1980), and *United States* v. *One 1974 Cadillac Eldorado Vin*, 575 F.2d 344 (2d Cir. 1978), which, he asserts (Pet. 6-7), "held the government to a higher burden of proof in forfeiture actions" under Section 881(a)(4). This contention is without merit.

Both *One 1972 Chevrolet Corvette* and *One 1974 Cadillac Eldorado Vin*, reversed forfeitures under Section 881(a)(4) on the ground that because there was no "antecedent relationship" between the vehicles in question and the underlying drug transactions, the use or intended use of the vehicles did not "facilitate" the "transportation or sale" of the drugs as required under the terms of the forfeiture statute. In *One 1972 Chevrolet Corvette*, the vehicle had been driven to the site where its owner expected to receive his share of the profits from a completed drug deal (625 F.2d at 1030). Similarly, in *One 1974 Cadillac Eldorado Vin*, the vehicle merely appeared at the site of the sale after the drugs had arrived, and the dealer then rode off in it with his family (575 F.2d at 345).

Even assuming that the "in any manner" language can be interpreted to incorporate the "antecedent relationship" requirement adopted by these courts,[3] in this case petitioner's airplane in fact had an "antecedent relationship"

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[3]As petitioner notes (Pet. 7), the court in *One 1972 Chevrolet Corvette* (625 F.2d at 1029) found support for its holding in the legislative history of 21 U.S.C. (Supp. V) 881(a)(6), which provides for

to the drug scheme. It was used to transport petitioner and Sullivan to their meeting with the undercover agents to pick up the P2P, and it was actually used to transport the P2P from Abilene to Amarillo, where petitioner knew that it was to be used to manufacture controlled substances (Pet. App. 5a). See *United States* v. *Fleming*, 677 F.2d 602, 609-610 (7th Cir. 1982); *United States* v. *One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 425 (2d Cir. 1977). Thus, nothing in the decisions of the First or Second Circuits gives any indication that they would decide this case any differently from the way the Fifth Circuit has. Accordingly, review by this Court is not warranted.

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forfeiture of currency used to facilitate narcotics activities. The Joint House and Senate explanation of the 1978 amendment adding subsection (a)(6) states that property would be forfeited under that provision "only if there is a substantial connection between the property and the underlying criminal activity." 124 Cong. Rec. 34671 (1978). By referring to this statement in the legislative history of Section 881(a)(6), however, the First Circuit did not say that it was adopting a "substantial connection" test for Section 881(a)(4) forfeitures; it merely found the statement to be an additional source of support for its decision. See 625 F.2d at 1029. In any event, its reliance on this legislative history is unjustified. The difference in the language of the two subsections — (a)(4) expansively refers to facilitation "in any manner" — is a clear indication that Congress intended the forfeiture of vehicles to be easier; therefore, the limitation in the 1978 legislative history was never intended to apply to forfeitures under Section 881(a)(4). See *United States* v. *One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 425 (2d Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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